92-352

No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

JASON W. NOVAK

Petitioner,

vs.

ANDERSEN CORPORATION, a Minnesota corporation, and ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,
and

G.A. HOEL, JOHN VICTOR JENSEN, M.O. JOHNSON, L.W. KEDROWSKI, H.C. MEISSNER, G. SCHNEIDER, W.A. WELLMAN, individually and as Trustees, Plan Administrators and Committee Members of the ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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LISTING OF ADDITIONAL PARTIES

and

John Doe and Richard Roe and other Trustees, Plan Administrators and the Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust, whose identities are unknown.

Defendants

QUESTION PRESENTED

I. Whether monetary damages are considered "other appropriate equitable relief" within the meaning of ERISA Section 502(a) (3)?

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In the

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JASON W. NOVAK
Petitioner,
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ANDERSEN CORPORATION, a Minnesota corporation, and ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,
and

G.A. HOEL, JOHN VICTOR JENSEN, M.O. JOHNSON, L.W. KEDROWSKI, H.C. MEISSNER, G. SCHNEIDER, W.A. WELLMAN, individually and as Trustees, Plan Administrators and Committee Members of the ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Jason W. Novak, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING BELOW

Jason W. Novak

Andersen Corporation, a Minnesota corporation

Andersen Corporation Employee Stock Ownership Plan and Trust

G.A. Hoel

John Victor Jensen

M.O. Johnson

L.W. Kedrowski

H.C. Meissner

G. Schneider

W.A. Wellman

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision granting summary judgment for Respondents (Appendix A-1) was filed April 9, 1992.

The United States District Court's Order granting summary judgment to Respondents (Appendix A-11) was entered March 20, 1991.

The decision of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing (Appendix A-22) was filed May 29, 1992.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on April 9, 1992. A Petition for rehearing was denied by the Court of Appeals on May 29, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1990).

STATUTES INVOLVED

This case involves Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1132 (a) (1990):

"§1132. Civil Enforcement.

(a) Persons enpowered to bring a civil action. A civil action may be brought —

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of

his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. §1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. §1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provisions of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c) (2) or (i) or (1).

STATEMENT OF THE CASE

Petitioner Jason Novak's action arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001, et. seq. ("ERISA"). Petitioner contends that Respondents breached their fiduciary duty to Petitioner to distribute the notice of roll-over option pursuant to Internal Revenue Code Section 402(f) as required by Section 3.9 of the Andersen Corporation Employee Stock Ownership Plan and Trust ("the Plan"). Petitioner's remedy arises under 29 U.S.C. Section 1132(a) (3) (ERISA Section 502(a) (3)). Respondents moved for summary judgment on several grounds. The District Court granted Respondents' motion for summary judgment holding that the damages sought by Petitioner were extra-contractual and that extra-contractual damages are not available under ERISA Section 502(a) (3). In thus

deciding, the District Court declined to follow the Sixth Circuit decision in *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (6th Cir. 1990); *cert. denied* 111 S. Ct. 2256 (1991); and stated it was adopting the reasoning of the First, Fourth, Fifth, Seventh and Ninth Circuits, all of which had determined that extra-contractual damages are not available under ERISA Section 502(a) (3). Thereafter, Petitioner appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit, in a 2-1 decision, affirmed the District Court's decision holding that the damages sought by Petitioner are not "equitable relief" with in the meaning of the statute. Appendix at A-1. Petitioner's Petition for Rehearing was denied.

Novak was employed by Andersen Corporation ("Andersen") until June 26, 1987 when he voluntarily terminated his employment. At that time, Novak elected to cash out his accumulated benefits in the Plan. Pursuant to his request, Novak received a single sum distribution of $84,637.00 on June 29, 1987, and a $3,199.54 distribution to clear out his account on February 2, 1988. At the time of his receipt of the aforementioned Plan benefits, Novak was not provided with a written explanation of the "roll-over notice" pursuant to Internal Revenue Code Section 402(f) (a written explanation of the provisions under which his distribution would not be subject to tax if transferred to an eligible retirement plan within 60 days of the distribution.)

As a direct result of Respondents' failure to provide the roll-over notice, Novak failed to roll over his benefit distribution within the required 60 day period and thus sustained substantial tax liability and the loss of tax-free compounding of benefits.

On August 12, 1988, counsel for Novak sent a letter to Andersen raising the issue of the failure to provide the 60-day roll-over notice to Novak. By letter of August 30, 1988, the manager of Employee Benefits at Andersen acknowledged that the roll-over notice had not been given to Novak.

On May 9, 1989, counsel for Novak, sent another letter to Andersen setting forth the breaches of fiduciary duty and demanding damages in the amount of $56.912.00 from the

Plan committee and fiduciaries. By its letter of June 13, 1989, the Plan committee stated that it had considered Novak's demand and denied the claim. It interpreted the Plan provision as requiring distribution of ERISA-required reports only and not IRS required notices. Thereafter, Novak filed suit.

REASONS FOR GRANTING THE WRIT

This court should grant the writ sought by Petitioner Novak because the ruling of the United States Court of Appeals for the Eighth Circuit that money damages are not "other appropriate equitable relief" within the meaning of ERISA Section 502(a) (3) is in direct conflict with a decision of the United States Court of Appeals for the Sixth Circuit on the identical issue, i.e., *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (1990), *cert. denied,* 111 S. Ct. 2256 (1991).

At the time Novak elected to cash-out his accumulated benefits in the Plan on June 28, 1987 and February 2, 1988, the Plan in Section 3.9 provided as follows:

> "3.9 *Reports, etc.* The Committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file *and distribute* the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the Committee." (Emphasis supplied).

This language is unambiguous. It requires the Committee to prepare and distribute *all* reports, disclosures and filings required by law. Internal Revenue Code Section 402(f) (26 U.S.C. Section 402(f)) requires the Plan administrator to provide:

> "a written explanation to the recipient (A) of the provision under which such distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution . . ."

Since this notice is required by law, the plain meaning of Plan Section 3.9 required that the notice be prepared and

distributed to Novak. The Respondents admitted both in their letter of August 30, 1988 and again in their Answer that no such notice pursuant to Code Section 402(f) was ever given to Novak.

The Committee members were clearly fiduciaries and at all times owed a fiduciary duty to Novak. Their failure to distribute the notice of roll-over option as required by Plan Section 3.9 was a violation of the express terms of the Plan, and thus a violation of their fiduciary duty to Novak.

Novak's remedy arises under ERISA Section 502(a) (3) which provides in pertinent part as follows:

> "A civil action may be brought . . . (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provisions of this title or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . ." *29 U.S.C. § 1132(a) (3).*

In the instant case, the Eighth Circuit upheld the District Court decision granting summary judgment to Respondents holding that damages sought by Novak are not "equitable relief" and are thus unavailable under 502(a) (3).

The Eighth Circuit decision relied in part on *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 87 L.Ed.2d 96, 105 S.Ct. 3085 (1985).

Since Novak's cause of action arises under ERISA Sections 404(a) and 502(a) (3), *Russell* does not act as a bar to Novak's cause of action. The Plaintiff in *Russell* brought her cause of action pursuant to ERISA Section 409(a) and Section 502(a) (2), which are entirely different Sections of the ERISA Statute.

Indeed, in *Russell,* this Court expressly reserved judgment as to whether any other provision of ERISA (including Section 502(a) (3)) authorizes recovery of extra-contractual damages. 473 U.S. 139, n. 5.

In fact, Mr. Justice Brennan, in his concurring opinion, stated:

> "Section 502(a) (3) authorizes the award of 'appropriate

equitable relief' directly to a participant or beneficiary to 'redress' 'any act or practice which violates any provision of this title or the terms of the plan'. This section and section 404(a)'s fiduciary duty standards both appear in Title I, which is entitled 'PROTECTION OF EMPLOYEE BENEFIT RIGHTS.' A beneficiary, therefore, may obtain 'appropriate equitable relief' whenever an administrator breaches his fiduciary duties set forth in Section 404(a)." 473 U.S. at 154.

Novak is suing under Section 502(a) (3) and 404(a) (1) (D). Unlike 409(a) which the Plaintiff relied on in *Russell,* there is no language in 404(a) which suggests that remedies be limited to the plan itself.

The damages sustained by Novak resulted directly and proximately from the Respondents' failure to distribute the notice of roll-over option as required by Plan Section 3.9 and Internal Revenue Code Section 402(f). Not only did Novak suffer immediate loss through taxation, he also lost the income that could have been earned on these funds and the benefit of further accumulation of income on a tax deferred basis. These consequences were both foreseeable and reasonably certain to occur in the event Respondents failed to provide Novak with the notice of roll-over option. The amount of damages are reasonably certain and can be precisely calculated. They are not subject to other more subjective elements as are damages for emotional distress or punitive damages. They are *contractual* damages, not extra-contractual damages.

The Eighth Circuit's opinion held that there is no distinction between "contractual" or "extra-contractual" damages and that compensatory (monetary) damages are "legal" not "equitable" relief.

The Eighth Circuit attempted to determine what Congress meant when it allowed "other appropriate equitable relief". The Eighth Circuit stated that it must first look to the Statute itself (ERISA Section 502(a)). The Eighth Circuit stated that Section 502(a) is:

". . . the only section in the ERISA scheme which

provides for enforcement of an ERISA plan and relief to its beneficiaries. Nowhere does it allow damages which are reasonably foreseeable from a breach of the plan, as would generally be available in a legal action for breach of contract. Nor does Section 502(a) (3) expressly say anything about the recovery of compensatory or punitive damages. Absent some specific indication by Congress that it intended to offer a form of relief not explicitly provided for by the governing provisions, we cannot conclude that the statute itself affords Novak the relief he is requesting. And we find nothing in the statutory language to persuade us to interpret 'other appropriate equitable relief' to mean anything other than what it ususally means - declaratory or injunctive relief."

The Eighth Circuit's analysis of "other appropriate equitable relief" is much too narrow and is in direct conflict with a decision of the Sixth Circuit Court of Appeals.

In *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (6th Cir. 1990); *cert denied* 111 S. Ct. 2256 (1991), the Sixth Circuit Court of Appeals examined a claim for monetary damages under 502(a) (3) and rendered a decision directly in conflict with the Eighth Circuit in this case. The *Warren* case is factually similar to the instant case. In that case, Dr. Warren requested, pursuant to the terms of the Plan, that his qualified plan fiduciary complete a tax-free roll-over of this accounts under the Plan into an IRA. The fiduciary did not follow the terms of the Plan and Dr. Warren was directly injured by failure of a fiduciary to follow the terms of the Plan.

The Sixth Circuit in *Warren* also examined the term "other appropriate equitable relief" under ERISA Section 502(a) (3):

"The term 'other appropriate equitable relief' implies a broad range of remedies. We adhere to the principle 'endorsed regularly by the federal judiciary,' that 'when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals.' *Petrolera Caribe, Inc. v. Arco*

Caribbean, Inc., 754 F. 2d 404, 428 (1st Cir. 1985) (footnote omitted). One of the important goals of ERISA is to make certain that participants and beneficiaries not be deprived of the full value of their plan benefits by a fiduciary's breach of contract." *Warren* at 982.

In determining whether the damages sought by Dr. Warren constituted "other appropriate equitable relief," the Sixth Circuit found Justice Brennan's concurring opinion in *Russell,* to be instructive.

In that regard, the Sixth Circuit stated:

"Justice Brennan stated that a beneficiary may seek 'other appropriate equitable relief' when an administrator breaches the fiduciary duties set forth in Section 404(a). See *Russell,* 473 U.S. at 154, 105 S. Ct. at 3096. Given that Congress intended to incorporate the fiduciary standards of trust law into ERISA, it is proper to apply 'black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits'. *Id.* at 152-53, 105 S. Ct. at 3095-96 (footnote omitted). Under the law of trusts, 'a beneficiary is entitled to a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust'. See *Id.* at 157 n. 16, 105 S. Ct. at 3098 n. 16. (quoting Restatement (Second) of Trusts Section 205, and Comment a (1959)). And 'other appropriate equitable relief' under Section 502(a)(3), for breach of fiduciary duties set forth in Section 404(a), includes the provision of monetary damages. *Id.* at 154 n. 10, 105 S. Ct. at 3096 n. 10."

* * *

"We believe Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages. See *Russell,* 473 U.S. at 154 n. 10, 157 n. 16, 105 S. Ct. at 3096 n. 10, 3098 n. 16. Our position is supported

by the decisions of other courts of appeals finding that equitable relief includes monetary damages where required to afford complete relief. It is the historic purpose of equity to secure complete justice, and courts may adjust their remedies so as to grant the necessary relief. *Walters v. Marathon Oil Co.,* 642 F. 2d 1098, 1100 (7th Cir. 1981); *United States v. Martinson,* 809 F. 2d 1364, 1367 (9th Cir. 1987). Equitable relief may include monetary damages if necessary to do complete justice. *Walters,* 642 F. 2d at 1100; *Goldberg v. Medtronic, Inc.* 686 F. 2d 1219, 1229 (7th Cir. 1982)."

The *Warren* Court went on to distinguish may of the other circuit court cases which have held that 502(a) (3) does not provide for extra-contractual damages. In many of those cases, the damages sought were different in nature from the contractually based damages sought by Dr. Warren. *Warren* at 980, 982. Dr. Warren's case was contractual in nature, as is Novak's. The Sixth Circuit held that monetary relief was appropriate under 502(a) (3) in that situation and remanded the case to determine the merits of the facts presented by Dr. Warren.

This Court denied the Plan Fiduciary's Petition for Certiorari inthe *Warren* case.

Additionally, in *Warren,* this Court requested that the Solicitor General of the United States file an amicus brief stating the government's position on granting certiorari. The Solicitor General filed an amicus brief in opposition to this Court's granting certiorari to the Defendants in the *Warren* case. The Solicitor General believed that the damages claimed by Dr. Warren were contractual in nature rather that extra-contractual and that there was literally no conflict between the Sixth Circuit's decision in *Warren* and the First, Fourth, Fifth, Seventh and Ninth Circuits which had all held that extra-contractual damages are not available to claimants under ERISA Section 502(a) (3).

The Solicitor General, setting forth the position of the United States Government, stated in its amicus brief in the *Warren* case:

"In our view, the Court of Appeals correctly decided that Section 502(a) (3) authorizes federal courts to award make-whole relief to participants and beneficiaries for foreseeable losses that result directly from the breach of the terms a plan or from a violation of one of ERISA's substantive requirements. Such authority, we believe, is embraced within the power to grant 'other appropriate equitable relief' because that phrase is not limited to injunctions and declaratory judgments; rather it extends to the range of remedies developed by courts of equity in the enforcement and administration of trusts. And embraced within these remedies are monetary damages arising from breaches by fiduciaries of their contractual commitments.

"That conclusion is not inconsistent with this Court's decision in *Russell* and does not conflict with the decisions of the Courts of Appeals that have held unavailable under Section 502(a) (3) types of damages not normally regarded as flowing directly from a breach of a fiduciary obligation or the terms of an employee benefit plan, e.g., punitive damages awards, awards for emotional distress, and awards for certain other forms of extra-contractual damages. Further review by this Court is therefore not warranted."

The effort of the Eighth Circuit in this case to try to factually distinguish Novak's claim from the Plaintiff's claim in *Warren* is also erroneous. The Eighth Circuit's statement that the beneficiary in *Warren* was denied an actual benefit to which he was entitled under the Plan, and that in the instant case Novak received all of the benefits under the Plan, clearly demonstrates its misunderstanding of the fundamental issues herein.

In *Warren,* Dr. Warren received a distribution of all of the benefits he had coming under the Plan. They simply weren't rolled over into another qualified plan within the same calendar year as the Plan provided, and as he

requested of the fiduciaries. As a result of this breach by the fiduciary, Dr. Warren suffered additional tax and the loss of tax-free compounding of the benefits. That is the identical issue and the identical damage claim presented by Novak in this case.

Both cases involve a fiduciary's failure to act in accordance with the plan's terms. Both cases involve loss of the opportunity to maintain retirement funds in a tax-free environment because of the failure of the fiduciaries to carefully administer the provisions of their plans relating to roll-overs.

All of the arguments set forth above with regard to the *Warren* case, and all of the arguments put forth by the Solicitor General in its amicus brief opposing the grant of certiorari to review the Sixth Circuit's decision in *Warren* are equally applicable to the facts of the instant case. The damages claimed by Novak are precisely the same type of damages claimed by Dr. Warren. They are clearly contractually based damages and under ERISA Section 502(a) (3) with its underpinnings of traditional contract and trust common law principles, Novak should be allowed to pursue a remedy that will make him whole. The remedy sought by Novak is in futherance of the underlying purposes of ERISA.

Petitioner submits that the decision of the Sixth Circuit on this issue was correct and the decision of the Eighth Circuit in the instant case was erroneous.

Finally, it is time for this Court to address and resolve once and for all, the issue that was left expressly reserved in the *Russell* decision, i.e., whether any other provision of ERISA (including Section 502(a) (3)) authorizes recovery of the damages sought here. *Russell,* 473 U.S. 139, n. 5.

For the reasons set forth above, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

I. Decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court Decision granting Summary Judgment for the Respondents, dated April 9, 1992 ..... A-1

II. Order of the United States District Court granting Respondents' Motion for Summary Judgment, filed March 20, 1991 ..... A-11

III. Order of the United States Court of Appeals for the Eighth Circuit denying Petition for Rehearing, dated May 29, 1992 ..... A-22

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-1957MN

Jason W. Novak, Appellant, v. Andersen Corporation, a Minnesota corporation; Andersen Corporation Employee Stock Ownership Plan and Trust; G.A. Hoel, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Stock Ownership Plan and Trust; John Victor Jensen, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; M.O. Johnson, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; L.W. Kedrowski, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; H.C. Meissner, individually and as	*	**On Appeal From The United States District Court for the District of Minnesota**

Trustee, Plan Administrator and *
Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and Trust; *
G. Schneider, individually, and *
as Trustee, Plan Administrator *
and Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and *
Trust; W.A. Wellman, *
individually, and as Trustee, *
Plan Administrator and *
Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and Trust; *
John Doe; Richard Roe; Other *
Trustees; Plan Administrators *
and the Committee Members of *
the Andersen Corporation *
Employee Stock Ownership Plan *
and Trust, whose identities are *
unknown, *
Appellees. *

Submitted: November 15, 1991
Filed: April 9, 1992

Before LAY,* Chief Judge, ARNOLD,** Circuit Judge, and STUART, Senior District Judge.***

---

*The Hon. Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

**The Hon. Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

***The Hon. William C. Stuart, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

ARNOLD, Circuit Judge.

This is a case brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq..,* by the beneficiary of a qualified ERISA plan to recover damages for his former employer's alleged breach of its fiduciary duty under that plan. The District Court[1] granted summary judgment for the defendants, holding that the damages requested by the plaintiff were extra-contractual damages, and that extra-contractual damages are not available under ERISA. We hold that the damages sought by plaintiff in this case are not "equitable relief" within the meaning of the statute, and we therefore affirm.

I.

Jason W. Novak was employed by Andersen Corporation until June 26, 1987, when he quit and elected to cash out his accumulated benefits in the Andersen Corporation Employee Stock Ownership Plan (the Plan), a qualified ERISA plan. He received a distribution of $84,637 on June 29, 1987, and a final distribution of $3,199.54 on February 2, 1988. Neither Andersen Corporation nor the Plan administrators gave Novak written notice of the "roll-over option," as required by Internal Revenue Code § 402(f), upon either of the distributions. The roll-over notice explains the procedures under which Novak's distribution would not have been immediately subject to tax if transferred to an eligible retirement plan within sixty days of the distribution. Novak did not transfer his distribution to an eligible retirement plan and was therefore taxed on the entire distribution.

On August 12, 1988, and again on May 9, 1989, Novak's counsel sent a letter to Andersen Corporation regarding its failure to provide the notice alleged by Novak to be required under the Plan. Novak points to paragraph 3.9 of the Plan, which states that "[t]he committee shall prepare, or cause to be prepared, such reports, disclosures and

[1] The Hon. David S. Doty, United States District Judge for the District of Minnesota.

other filings as are required by law and shall . . . distribute the same as so required." Novak claimed in the letters, and continues to claim here, that the roll-over notice is a disclosure "required by law" and, consequently, it should have been sent to him. Novak demanded damages, alleging that the committee's failure to give him the notice was a breach of its fiduciary duty. On June 13, 1989, the Plan committee stated that it had considered Novak's demand and denied the claim. The committee interpreted the provision as requiring distribution of only ERISA-required reports and not IRS-required notices. A week later, Novak filed suit.

II.

The parties agree that the Plan administrators did not give written notice to Novak as required by section 402(f) of the Internal Revenue Code. Furthermore, we will assume without deciding that this failure to give notice was a breach of the Plan. The only issue, then, is whether the alleged breach is remediable under ERISA.

Novak's remedy, if he has one, arises under 29 U.S.C. § 1132(a) (3) (ERISA § 502(a) (3)), which states:

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> (1) . . .
>
> (2) . . .
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

ERISA also provides a legal remedy, which allows a beneficiary to recover monetary damages for benefits owed under the Plan. The Plan here does not provide, and Novak does not argue, that compensation for tax losses caused by the Plan administrator's failure to give a roll-over notice is one of those benefits. In fact, Novak

concedes that he received all benefits to which he was entitled under the Plan. He claims he is not seeking legal relief at all, but equitable relief under § 502(a) (3) (B), and that the only "appropriate equitable relief" is monetary damages. We do not disagree with Novak's assertion that monetary damages may indeed be the only appropriate relief in this case. We do disagree, however, with his proposition that an award of monetary damages is equitable relief under ERISA.

Novak rests his argument on the distinction between contractual damages and extra-contractual damages. He claims that his damages are contractual damages and fit within § 502(a) (3) under "other appropriate equitable relief." The relevance of the distinction between contractual and extra-contractual for purposes of this particular section of ERISA escapes us. Both are monetary damages; both are traditionally legal, not equitable, relief. The fundamental issue, then, is not whether, as Novak claims, the damages are contractual or extra-contractual, but rather whether these monetary damages qualify as "other appropriate equitable relief."

No one disputes that ERISA allows a beneficiary such as Novak to get "contractual" damages – i.e., funds to which he is entitled under the Plan – under a different ERISA provision. See 29 U.S.C. § 1132(a) (1) (B) (ERISA § 502(a) (1) (B)). Novak is not claiming damages under this provision, however. The ERISA provision Novak invokes entitles him, as a beneficiary, to equitable relief, i.e., forcing a delinquent plan administrator to perform his duties under the plan or even, if warranted, imposing a constructive trust on the plan's assets. It does not, however, entitle him to force a delinquent plan administrator to pay monetary damages to compensate Novak for injuries suffered as a result of the administrator's alleged breach of the plan, whether he calls those damages "contractual" or "extra-contractual." This is true regardless of the fact that Novak could possibly get such damages in a non-ERISA breach-of-contract action.

III.

To determine what Congress meant when it allowed "other appropriate equitable relief," we look first to the statute itself.[2] ERISA § 502(a) is the only section in the ERISA scheme which provides for enforcement of an ERISA plan and relief to its beneficiaries. Nowhere does it allow damages which are reasonably foreseeable from a breach of the plan, as would generally be available in a legal action for breach of contract. Nor does § 502(a) (3) expressly say anything about the recovery of compensatory or punitive damages. Absent some specific indication by Congress that it intended to offer a form of relief not explicitly provided for by the governing provisions, we cannot conclude that the statute itself affords Novak the relief he is requesting. And we find nothing in the statutory language to persuade us to interpret "other

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[2] **(a) Persons empowered to bring a civil action**

A civil action may be brought –

(1) By a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or be a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant[ ] or beneficiary, for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

29 U.S.C. § 1132(a) (ERISA § 502(a)).

appropriate equitable relief" to mean anything other than what it usually means -- declaratory or injunctive relief.

An examination of the statute's legislative history further compels the conclusion that the damages claimed by Novak are unavailable. The Senate Finance Committee report on ERISA defined "appropriate equitable relief" as follows:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries. Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary or participants or beneficiaries if he has violated any of the specified fiduciary obligations .... It is expected that a fiduciary ... may be removed for repeated or substantial violations of his responsibilities, and that upon removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan.

S. Rep. No. 383, 93d Cong., 2d Sess. 105-06, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989. This passage lists the traditional equitable remedies of injunctive and declaratory relief and imposition of a contructive trust. We are not inclined to legislate by adding monetary damages to this already complete list.

Finally, although it did not squarely address the issue before us, the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985), held that 29 U.S.C. § 1109(a) (ERISA § 409(a)) allowing "such other equitable or remedial relief as the court may deem appropriate" did not allow a court to award extra-contractual damages to a beneficiary. Extra-contractual damages included damages which compensated the injured party for losses and injuries causes by a breach of the administrator's fiduciary duties. See 473 U.S. at 138. The Court explained as follows:

> [t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertant omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 361 (1980).

473 U.S. at 146. While *Russell* interpreted ERISA § 409(a) and not § 502(a) (3) (B), we find its analysis persuasive in interpreting "equitable relief" under § 502(a) (3) (B).

Novak points to a Sixth Circuit case, *Warren v. Society National Bank,* 905 F.2d 975 (1990), *cert. denied,* 111 S. Ct. 2256 (1991), to support his claim that his damages are contractual and, hence, recoverable. *Warren* held that certain damages claimed by a beneficiary of an ERISA plan were "contractual" – as opposed to extra-contractual like those in *Russell* – and were recoverable under § 502(a) (3) (B) as "other appropriate equitable relief." Novak argues that his situation is factually similar to the plaintiff's situation in *Warren* and urges us to adopt its reasoning.

First, we decline to adopt the reasoning of the Sixth Circuit on this issue. As we stated earlier, whether Novak's damages are contractual or extra-contractual is irrelevant to our decision. Both are monetary damages; both are traditionally legal, not equitable, relief. We disagree with the Sixth Circuit that the fact that the damages are "contractual" somehow makes them an equitable remedy. We agree with the dissent that § 502(a) (3) (B) uses the word "redress," and that "redress" means "to compensate." Undeniably, contractual damages do "redress" the injury, just as all remedies by definition "redress" an injury. But § 502(a) (3) (B) allows only

"appropriate equitable relief . . . to redress such violations." Damages are damages, and an award of damages is a legal, not an equitable, remedy.

Furthermore, even if we were inclined to follow *Warren* and award damages under § 502(a) (3) (B) in some situations, this would not be one of those situations. In *Warren* the beneficiary claimed he was denied one of the specific benefits under the plan. That is, the plan gave its beneficiaries several options under which they could withdraw their share of the plan assets. The option the beneficiary in *Warren* chose was a single-sum distribution. The plan administrator failed to follow the beneficiary's instructions and make a single-sum distribution, causing the damages claimed. Therefore, the beneficiary in *Warren* was denied an actual benefit he was entitled to under the plan. Novak, however, received all of the benefits to which he was entitled under the Plan. He claims that the administrators committed a breach of their fiduciary duty by failing to give notice of the roll-over option. We see a consequential difference between an administrator's failing to provide a benefit under the plan and violating a fiduciary duty.

Affirmed.

STUART, Senior District Judge, dissenting.

The majority holds that the damages sought by plaintiff in this case are not "equitable relief" within the meaning of the statute. Because I believe that the statute gives the courts authority to decree such compensation and that the *Russell* case is distinguishable on both factual and legal grounds, I dissent.

I would adopt the reasoning of Senior Circuit Judge Lively expressed in *Warren v. Society National Bank,* 905 F.2d 975, 978-983 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 2256 (1991). *See also Russell,* 473 U.S. at 148-158 (Brennan, J., concurring). In context, the phrase "other appropriate equitable relief . . . to redress such violations" should be construed to authorize courts to fashion remedies for existing rights created by ERISA or plan provisions. The

form of remedy is to be shaped generally by reference to equity jurisprudence, which permits decrees for the payment of money. *See Warren,* 905 F.2d at 981-82. In particular, however, the use of the word "redress" emphasizes the authority of the court to order compensation. "Redress" is defined as "to set (a wrong) right: REMEDY *** to make up for: COMPENSATE ***." *Webster's Third New Int'l Dictionary* 1904 (1971). *See also Black's Law Dictionary* 1150 (5th Ed. 1979) ("Satisfaction for an injury or damages sustained. Damages or equitable relief."). Accordingly, I would hold that the courts have authority to order the compensation sought here as "other appropriate equitable relief" under § 1132 (a) (3) (B) (i).

This holding would not conflict with other court of appeal's holdings. They involve claims for punitive damages, emotional distress or other clearly extracontractual damages. The claim here is that failure to give notice of the rollover provision of the IRS violated the plan provision to give notices "required by law" and resulted in additional income tax. I consider this a loss alleged to have been caused directly by breach of contract.

On the other hand, the majority's holding creates a direct conflict with the decision of the Sixth Circuit in *Warren. See Warren,* 905 F.2d at 982. Given that the opinion of the court in *Russell* did not address the issue, *see* 472 U.S. at 139 n.5, I would follow the guiding light given by Justice Brennan's concurrence and Judge Lively's opinion in *Warren* and reverse the decision of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court

District of Minnesota

Fourth Division

Jason W. Novak,
Plaintiff,

v.

Andersen Corporation, a Minnesota corporation, and Andersen Corporation Employee Stock Ownership Plan and Trust,

and

G. A. Hoel, John Victor Jensen, M. O. Johnson, L. W. Kedrowski, H. C. Meissner, G. Schneider, W. A. Wellman, individually and as Trustees, Plan administrators and Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust,

and

John Doe and Richard Roe and other Trustees, Plan Administrators and the Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust, whose identities are unknown,
Defendants.

Civil No. 4-90-458
4-90-537

ORDER

Mathew B. Newman, Esq., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415 and David D. Himlie, Esq., and Dederick & Himlie, 5200 Willson Road, Suite 405, Edina, MN 55424-1332, counsel for plaintiff.

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FILED MAR 20 1991
JUDGMENT
ENTERED MAR 20 1991

This matter is before the court on defendants' motion for summary judgment. For the reasons stated herein, the defendants' motion will be granted.

FACTS

Plaintiff Jason W. Novak was employed by defendant Andersen Corporation ("Andersen") until June 26, 1987, when he voluntarily terminated his employment. At the time he concluded his employment with Andersen, Novak elected to cash out his accumulated benefits in the Andersen Corporation Employee Stock Ownership Plan ("the Plan"). As a result of this decision, plaintiff received a single sum distribution of $84,637 on June 29, 1987. On February 2, 1988, plaintiff received a final distribution of $3,199.54 which effectively cleared out his account in the Plan.

Neither at the time that plaintiff received his single sum distribution nor at the time when his account was cleared out did plaintiff receive a written explanation of the "roll-over notice" required by Internal Revenue Code § 402(f). The roll-over notice explains the procedures under which Novak's distribution would not have been subject to tax if transferred to an eligible retirement plan within 60 days

of the distribution. On August 12, 1988, plaintiff's counsel sent a letter to Andersen regarding Andersen's failure to provide the roll-over notice to plaintiff. John Johnson, Andersen's manager of employee benefits, responded to the inquiry in a letter dated August 30, 1988. That letter stated:

> I am certainly aware of Code Section 402(f) and its requirements. However, our files do not contain any indication that Jason was given a written explanation of roll-over rules when he received the interim distribution from our plan on June 29, 1987 and I do not recall giving one to him. It is quite possible that I inadvertantly failed to give him the written explanation. However, I do remember discussing it with him and he did not want any withholding from either check. It did not appear that Mr. Novak had any intentions of rolling the distribution over to an IRA. I also remember going through a quick example of how the 10% penalty for distribution received prior to age 59½ are applied.

On May 9, 1989, plaintiff's counsel sent a letter to Andersen alleging that the fiduciaries of the Plan violated the terms of the Plan by failing to provide the roll-over notice. The letter demanded damages in the amount of $56,912 from the Plan committee and fiduciaries. The Andersen Corporation Employee Stock Ownership Plan Committee (the "Committee") responded to plaintiff's counsel's demand in a letter dated June 13, 1989. The Committee indicated that it had considered plaintiff's demand and denied the claim. The letter further stated that the Committee had interpreted the Plan provision on which plaintiff relied to require only distribution of ERISA-required reports and not IRS-required notices. The Committee indicated that Novak could appeal the Committee's decision within 45 days. No appeal was taken, however.

Plaintiff filed suit in this court on June 21, 1990, and the first defendant was served on June 27, 1990. The federal

suit alleges violation of the ERISA Plan and common law breach of contract and breach of fiduciary duty related to the same alleged actions. Also served on June 27, 1990, was plaintiff's state court complaint. The state court action alleges common law breach of contract and breach of fiduciary duty identical to the claims alleged in Counts II and III of the federal complaint. The state court action was later removed to this court. Both the federal action and the state action are now before this court and the defendants have moved for summary judgment in both cases.

DISCUSSION OF LAW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as the the verdict. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Stated in the negative, summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); Fed. R. Civ. P. 56(c). A fact is material only when its resolution affects the outcome of the case. *Anderson,* 477 U.S. at 248. On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. *Id.* at 250. The nonmoving party, however, may not rest upon mere

denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex,* 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. *Id.* at 322-23. With this standard at hand, the court will consider the defendants' motion for summary judgment.

A. *Plaintiff's State Common Law Claims*

Counts II and III of plaintiff's federal complaint are identical to Counts I and II of plaintiff's complaint which was originally filed in state court. Both counts alleged state common law causes of action. At the pretrial conference held on this matter, plaintiff's counsel indicated that summary judgment is appropriate on the state common law claims. Accordingly, summary judgment will be entered in favor of defendants and against plaintiff on Counts II and III of Court File No. 4-90-458 and on both counts alleged in Court File No. 4-90-537. In light of this decision, the only issue the court need address in detail is whether defendants are entitled to summary judgment on Count I of Court File No. 4-90-458, plaintiff's ERISA claim.

B. *The ERISA Claim*

Plaintiff alleges that the Plan fiduciaries have breached their fiduciary duty to him by failing to provide the roll-over notice. Plaintiff contends that he is entitled to damages resulting from that breach. Defendants have moved for summary judgment on plaintiff's claim for damages resulting from an alleged breach of their duties under ERISA on three grounds. Defendants first contend that the Plan does not require the distribution of the roll-over notice as plaintiff alleges. Second, defendants contend that plaintiff failed to exhaust his administrative remedies before bringing this lawsuit. Finally, defendants argue that the damages plaintiff seeks are not available

under ERISA. The court will address each of these grounds for summary judgment in turn.

1. The Notice Requirement Under the Plan

Defendants contend that they are entitled to summary judgment on plaintiff's claim of breach of fiduciary duty because the Plan does not require distribution of the roll-over notice. In support of their position, defendants point to § 3.9 of the Plan which provides:

> *Reports, Etc.* The Committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file and distribute the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the Committee.

Defendants contend that the Committee has been granted discretion to interpret the Plan provisions. The defendants then cite *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), for the proposition that "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." Defendants argue that because the Plan has conferred discretion upon the Committee to interpret the plan, the Committee's interpretation of the Plan can only be disturbed if it is arbitrary and capricious or an abuse of discretion. In support of this proprosition defendants cite *Redmond v. Burlington Northern R.R. Co. Pension Plan,* 821 F.2d 461 (8th Cir. 1987). Defendants contend that their letter to plaintiff dated June 13, 1989, revealed its interpretations of § 3.9 of the Plan. In defendants' view, their interpretation of the Plan's requirements regarding reports and disclosures was not arbitrary and capricious and thus may not be disturbed.

Plaintiff takes a different view. First, plaintiff argues that pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, summary judgment is inappropriate at this

time because discovery necessary to defeat defendants' motion is incomplete. Plaintiff raised this argument in his memorandum in opposition to defendants' motion for summary judgment and reiterated his request for additional discovery at the hearing on this matter. The court granted plaintiff's request and allowed additional limited discovery on the issue of the Plan administrator's good faith interpretation of the Plan. Pursuant to the court's authorization, plaintiff took the deposition of John Jensen, manager of employee benefits at Andersen and Leonard Kedrowski, secretary to the Plan Committee and a Plan Committee member. Information gained through this and other discovery have led the plaintiff to conclude that additional discovery is still needed to allow plaintiff to properly defend against defendants' motion for summary judgment on the issue of good faith interpretation of the Plan.

Among the issues plaintiff believes require additional discovery are the relationship between defendants' attorneys and the Committee's interpretation of the Plan. Plaintiff contends that defendants' attorneys were so inextricably bound up with interpretation of the Plan provisions that the defendants' attorneys are fiduciaries of the Plan. Plaintiff argues that because defendants' attorneys are fiduciaries of the Plan, the attorneys' work product is discoverable and the attorneys themselves may be deposed. Specifically, plaintiff requests the court to order defendants' attorneys to reveal the contents of a three-page memorandum that was prepared by defendants' counsel and forwarded to the Committee at its May 23, 1989, meeting.

The plaintiff's allegations concern the court. First, the court is concerned with the legal issues this case raises. An ERISA fiduciary's duty to provide the roll-over notice required by the Internal Revenue Code is an important legal issue and one that is apparently of much moment to the instant plaintiff. Second, the court is concerned about the factual allegations plaintiff has made. The

relationship and interaction between ERISA fiduciaries and their legal counsel is a sticky legal issue and particularly so in light of the factual allegations plaintiff has made in this case. Although the court is concerned about these issues and the allegations made in this matter, it need not reach these issues because defendants are entitled to summary judgment on an independent ground as discussed below.

2. Plaintiff's Failure to Exhaust Administrative Remedies

Defendants next contend that they are entitled to summary judgment on plaintiff's ERISA claim because plaintiff failed to exhaust his administrative remedies prior to bringing this lawsuit. Defendants contend that in a letter to plaintiff dated June 13, 1989, they informed plaintiff of his right to appeal the Committee's denial of his requested damages. Defendants also contend that the letter indicated that plaintiff had 45 days in which to take the appeal. Defendants argue that because no appeal was taken plaintiff has failed to satisfy the prerequisites to bringing this action and the action should be dismissed.

Plaintiff contends that filing an appeal was unnecessary for several reasons. Plaintiff argues that an appeal was unnecessary because any further Committee review of the Plan would have been meaningless. The court need not reach this issue and will not comment on the validity of either party's aguments because, as will be seen below, there is a separate and independent ground on which to grant defendants' motion for summary judgment.

3. The Availability of Extra-Contractual Damages under ERISA

Defendants argue that even if the failure to provide plaintiff will roll-over notice did constitute a breach of their fiduciary duty, and even if plaintiff's failure to appeal the Committee's decision within 45 days is not a bar to this action, they are still entitled to summary judgment because plaintiff seeks extra-contractual

monetary damages and such damages are not available under ERISA. In support of his claim for damages plaintiff relies on § 502(a) (3) of ERISA, which provides:

> [A civil action may be brought] by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the Plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter or the terms of the Plan.

29 U.S.C. § 1132(a) (3). Defendants contend that plaintiff's action cannot be sustained under § 502(a) (3) because that section authorizes "appropriate equitable relief" and plaintiff seeks compensatory damages. In short, defendants argue that because plaintiff seeks legal, not equitable, relief, his suit is not properly sustainable under § 502(a) (3).

Resolution of this issue requires the court to interpret the meaning of "appropriate equitable relief" as that phrase is used in § 502(a) (3). The United States Supreme Court has not directly addressed this issue. Several United States Circuit Courts of Appeals have addressed this issue, however. The First, Fourth, Fifth, Sixth, Seventh and Ninth Circuits have all addressed the issue. Of these courts, only the Sixth Circuit has found that extra-contractual damages are recoverable under § 502(a) (3). *Warren v. Society Nat'l Bank,* 905 F.2d 975 (6th Cir. 1990). All of the other circuit courts that have addressed the issue have found that extra-contractual damages are not available under § 502(a) (3). *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821 (1st Cir. 1988). *Powell v. Chesapeake & Potomac Tel. Co.,* 780 F.2d 419 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170 (1986); *Sommers Drug Stores Co. v. Corrigan Enterprises,* 793 F.2d 1456 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987); *Kleinhans v. Lisle Saving Profit Sharing Trust,* 810 F.2d 618 (7th Cir. 1987); *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir. 1986). *Cf. Dependahl v. Falstaff Brewing Corp.,* 653

F.2d 1208, 1216 (8th Cir. 1981) (holding that "as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee benefit plans.").

These courts have examined the reasoning the United States Supreme Court contained in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985). In *Massachusetts Mutual,* the Supreme Court examined § 502(a) (2) and held that Congress had intended that actions pursuant to that section be on behalf the plan as a whole, rather than an individual beneficiary. The ultimate effect of the *Massachusetts Mutual* decision was to bar the recovery of extra-contractual damages in suits initiated under § 502(a) (2). Although the Supreme Court specifically reserved the question of the availability of extra-contractual damages under §502(a) (3), various circuit courts of appeals have examined the reasoning which underlies the *Massachusetts Mutual* decision and have found it equally applicable to § 502(a) (3).

The court has considered the issue and has concluded that the greater weight of authority favors construing the phrase "appropriate equitable relief" strictly. Consequently, the court declines to follow the Sixth Circuit decision in *Warren v. Society Nat'l Bank,* 905 F.2d 975 (6th Cir. 1990) and adopts the reasoning of the First, Fourth, Fifth, Seventh and Ninth Circuits as set forth in the cases cited above.

Count I of plaintiff's complaint seeks recovery of extra-contractual damages under § 502(a) (3) for breach of fiduciary duty. In light of the court's conclusion that extra-contractual damages are not available under that section, plaintiff's claim must fail. Accordingly, because there is no genuine issue of material fact with respect to the availability of plaintiff's requested relief, defendants are entitled to summary judgment on plaintiff's ERISA claim.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment on plaintiff's state common law claims pleaded in Counts II and III of Court File No. 4-90-458 and Counts I and II of Court File No. 4-90-537, is granted; and

2. Defendants' motion for summary judgment on plaintiff's ERISA claim is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 20, 1991

David S. Doty, Judge
United States District Court

United States Court of Appeals
For The Eighth Circuit

No. 91-1957MNMI

Jason W. Novak,	*	
Appellant,	*	
vs.	*	
	*	**Order Denying Petition**
Andersen Corporation,	*	**for Rehearing and Suggestion**
a Minnesota corporation,	*	**for Rehearing En Banc**
et al.,	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

Judge Magill took no part in the consideration or decision of this case.

May 29, 1992

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

BEST AVAILABLE COPY

No. 92-352

U.S.
1992
CLERK

In The

Supreme Court of the United States

October Term, 1992

JASON W. NOVAK,

Petitioner,

v.

ANDERSEN CORPORATION, A MINNESOTA CORPORATION, AND ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

G. A. HOEL, JOHN VICTOR JENSEN, M. O. JOHNSON, L. W. KEDROWSKI, H. C. MEISSNER, G. SCHNEIDER, W. A. WELLMAN, INDIVIDUALLY, AND AS TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

JOHN DOE AND RICHARD ROE AND OTHER TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, WHOSE IDENTITIES ARE UNKNOWN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. WHETHER A PERSON WHO HAS RECEIVED ALL THE BENEFITS TO WHICH HE IS ENTITLED UNDER AN ERISA PLAN MAY RECOVER MONETARY DAMAGES AS "OTHER APPROPRIATE EQUITABLE RELIEF" UNDER § 502(A)(3) OF ERISA.

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No. 92-352

In The

Supreme Court of the United States

October Term, 1992

JASON W. NOVAK,

Petitioner,

v.

ANDERSEN CORPORATION, A MINNESOTA CORPORATION, AND ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

G. A. HOEL, JOHN VICTOR JENSEN, M. O. JOHNSON, L. W. KEDROWSKI, H. C. MEISSNER, G. SCHNEIDER, W. A. WELLMAN, INDIVIDUALLY, AND AS TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

JOHN DOE AND RICHARD ROE AND OTHER TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, WHOSE IDENTITIES ARE UNKNOWN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 962 F.2d 757. The opinion of the district court has not been reported.

STATEMENT OF THE CASE

Petitioner, Jason W. Novak, ("Novak") voluntarily terminated his employment at Andersen Corporation[1] on June 26, 1987. At the time, Novak had an account in the Andersen Corporation Employee Stock Ownership Plan (the "Plan"), which is an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Novak asked for and received a lump sum distribution of his entire account under the Plan.

After having received this complete distribution of his monetary benefits under the Plan, Novak commenced this action to recover monetary damages for taxes he paid with respect to the distribution he received. Novak contended that Respondents violated the Plan by failing to

[1] Pursuant to Rule 29.1 of the United States Supreme Court Rules, Andersen Corporation, which is not publicly traded, has no parent company and no non-wholly owned subsidiaries.

provide him with a written explanation of a rollover option under Internal Revenue Code § 402(f). The rollover notice required by Internal Revenue Code § 402(f) is nowhere required by ERISA. The administrators of the Plan, pursuant to discretionary authority given to them by the terms of the Plan, interpreted the Plan not to require distribution of this notice. Respondents, therefore, denied that there was a Plan violation and also alleged that oral notice of the rollover option was provided to Novak.

Respondents moved for summary judgment on two grounds: (1) that Novak's claim was precluded as a matter of law because the monetary damages sought did not constitute "other appropriate equitable relief" within the meaning of ERISA § 502(a)(3); and (2) that the Plan administrators properly interpreted the Plan and therefore no Plan violation had occurred. The District Court granted the motion for summary judgment on the first ground, without reaching the issue of whether the Plan required the notice. The Eighth Circuit affirmed that grant of summary judgment, also without reaching the issue of whether the Plan required the notice. Petitioner sought a rehearing en banc in the Eighth Circuit, but did not seek a rehearing by the original panel.[2] Petitioner then filed this petition for writ of certiorari.

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[2] It is questionable whether this petition is even timely. Under Rule 13.4 of the Supreme Court Rules a suggestion for rehearing in banc does not change the time for filing a Petition for Writ of Certiorari. Petitioners filed a "Petition for Rehearing En Banc" which asked only for an en banc rehearing. This Petition for Writ of Certiorari was filed more than 90 days after the judgment on appeal and therefore appears not to be timely under Rule 13.4.

REASONS FOR DENYING WRIT

I. THE EIGHTH CIRCUIT CORRECTLY INTERPRETED ERISA CONSISTENTLY WITH THE OTHER CIRCUITS.

A. The Eighth Circuit's Opinion Correctly Interprets ERISA.

Petitioner primarily supports his Petition for a Writ of Certiorari with arguments going to the merits of the legal issue presented. Apart from the fact that such merits arguments do not permit the issue to rise to the level where certiorari is appropriate, petitioner's merits arguments are clearly erroneous. Novak's position is tantamount to asking that the carefully drafted ERISA statute be rewritten. Plainly, monetary damages cannot constitute "equitable relief" under Section 502(a)(3) of ERISA as monetary damages constitute legal, not equitable, relief. Having drafted a comprehensive statute with carefully crafted remedy provisions, Congress was obviously mindful of the distinction between legal relief and equitable relief. After analyzing the remedies available under ERISA, together with the legislative history, the Eighth Circuit properly concluded that petitioner's argument constituted an invitation to rewrite the statute by stating "We are not inclined to legislate by adding monetary damages to this already complete list." *Novak v. Andersen Corp.*, 962 F.2d 757, 760 (8th Cir. 1992). Moreover, petitioner's merits arguments are inconsistent with the great weight of authority of the other circuits. Finally, petitioner's reliance upon the labels "contractual" and "extra-contractual" do not advance the merits of his position.

The key word in ERISA § 502(a)(3) is "equitable"; the word "legal" is noticeably absent. Underscoring that

Congress was mindful of the distinction between equitable and legal relief is the fact that the Senate version of the ERISA bill originally contained a section which provided for "civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 n.14 (1985) (*quoting* H.R. 2, § 693, 93d Cong., 2d Sess. (Mar. 4, 1974, 3 Leg. Hist. 3816)). The Supreme Court in *Russell* further noted that "[i]n the bill passed by the House of Representatives, and ultimately by the Conference Committee, the reference to legal relief was deleted." 473 U.S. at 146.

Moreover, in another section of ERISA, Congress plainly provided for legal relief. In § 502(g)(2), ERISA provides for "such other legal or equitable relief as the Court deems appropriate" when a fiduciary sues an employer to force the employer to make required contributions to the Plan. Unquestionably, in drafting ERISA, Congress understood the traditional distinction between legal and equitable relief, and it provided the relief it deemed appropriate in each section of the statute.

Significantly, remedies are very comprehensively addressed in ERISA § 502. Congress drafted ERISA as a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). As part of that statute, Congress drafted an "interlocking, interrelated and interdependent remedial scheme." *Russell*, 473 U.S. at 146. The comprehensive remedies provided in § 502(a), which were obviously crafted with care, strongly suggest that remedies not

expressly provided for were not intended. As stated by Justice Stevens in *Russell, Id.* at 146:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

Petitioner's attempt to obtain money damages under the words "equitable relief" is clearly contrary to this interlocking, interrelated and interdependent remedial scheme.

In addition to being contrary to the statutory language, petitioner's argument on the merits is contrary to overwhelming judicial precedent. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), this Court held that monetary damages were unavailable under ERISA §§ 409 and 502(a)(2). The language contained in ERISA § 502(a)(3) is no broader than the sections of ERISA construed in *Russell*. Moreover, every circuit that has addressed the issue has held that monetary damages are unavailable under ERISA § 502(a)(3) and in only one case have such damages ever been upheld. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Sommers Drug Stores Co. v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821 (1st Cir. 1988), *cert.*

denied, 488 U.S. 409 (1988). As the Court of Appeals for the Ninth Circuit has succinctly stated, "it appears that Congress used the word 'equitable' to mean what it usually means – injunctive or declaratory relief." *Sokol v. Bernstein*, 803 F.2d at 538.

Petitioner relies substantially upon an argument that his alleged damages are "contractual" as opposed to "extra-contractual" and the reasoning of the Sixth Circuit in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991). However, having received all of the monetary benefits to which he was entitled under the Plan, petitioner's claim actually is for consequential damages from an alleged breach of contract. More significantly, as correctly determined by the Eighth Circuit, the fundamental issue is not which label, contractual or extra-contractual, best fits Novak's alleged damages, but rather whether these monetary damages qualify as "equitable relief" under ERISA § 502(a)(3). Plainly, such monetary damages do not constitute equitable relief.

Furthermore, even assuming that the labels contractual and extra-contractual have some marginal relevance, appellant has misapplied the labels to his alleged damages. In *Russell, supra*, this Court discussed the terms contractual and extra-contractual in terms of distinguishing claims for contractually defined benefits from other claims. In writing for the majority, Justice Stevens stated:

> In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence – in the statute itself and in its legislative history – of any reference to

> an intention to authorize the recovery of extra-contractual damages.

473 U.S. at 148 (footnotes omitted). Thus, even utilizing petitioner's labels, the line between contractual and extra-contractual distinguishes between benefits which are contractually due under the Plan and those which are not. While a tax advantage might be a favorable consequence of receiving a contractually defined benefit, a tax advantage is not contractual unless expressly provided for by the terms of the Plan. *See also* Robertson, Closing the *Massachusetts Mutual v. Russell* Gap: Monetary Damage Awards under ERISA § 502(a)(3), 48 *Washington & Lee L. Rev.* 691, 720 (1991). Finally, damages that go beyond benefits defined by the Plan would not generally be available under the law of trusts. *See Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Restatement (Second) of Trusts* § 205 (1959) (liability for breach of trust is limited to (a) loss in value of trust estate; (b) profits accrued by trustee; or (c) profits lost to an estate). In sum, the damages sought are not recoverable under ERISA § 502(a)(3).

B. There is Not a Material Conflict Between the Circuits Which Requires Supreme Court Resolution.

Petitioner attempts to support his petition on a supposed conflict between an overwhelming number of cases in most circuits, including this case, and a Sixth Circuit case, *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir.

1990), *cert. denied*, 111 S. Ct. 2256 (1991).[3] While the Eighth Circuit declined to follow the Sixth's Circuit's reasoning in this case, the law with respect to the availability of monetary damages under ERISA is clear. Except for a narrow factual situation which is not likely to be repeated, all circuits find that monetary damages are not available under Section 502(a)(3) of ERISA. The *Warren* case is thus an anomaly which has been limited to the Sixth Circuit and to the specific factual situation presented in that case, and is likely tc remain so limited in the future.

Two circuits have had the opportunity to review the reasoning of the *Warren* case since that case was decided. The Seventh Circuit, between the time the Eighth Circuit appeal was argued and the Eighth Circuit rendered its decision in this case, decided a case requiring it to interpret *Warren*. The plaintiffs in that case claimed that since they were seeking financial damages, including increased taxes from a delay in receiving distributions under the Plan, they fit within the *Warren* rule and were entitled to

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[3] This case does not present a direct conflict with *Warren*. As the Eighth Circuit noted, Warren had done all that he could to obtain a tax-deferred distribution and the administrators' failure to follow his instructions caused the loss of tax-deferred status. Here, it was petitioner's failure to deposit his distribution in a proper account which led to the loss of tax deferral. If this case were remanded it would be proved at trial that oral notice was given. Petitioner's damages were thus not reasonably foreseeable nor were they caused by any alleged breach by respondents.

compensatory damages under ERISA. The Seventh Circuit stated "though well-intentioned, we do not find compelling the attempt to distinguish the injuries claimed by Dr. Warren from those alleged by the plaintiff in *Russell*. The *Russell* court made no mention of the 'directness' of the plaintiff's injuries in characterizing her claims as 'extracontractual.' " *Harsch v. Eisenberg*, 956 F.2d 651, 658 (7th Cir. 1992) *petition for cert. filed*, May 11, 1992. The Seventh Circuit thus recognized that the supposed distinction between contractual and extra-contractual damages found by the Sixth Circuit in *Warren* is not consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The Eighth Circuit in this case also followed this Court's *Russell* opinion.

Other courts and commentators have been equally quick to reject the reasoning in *Warren*. *See, e.g.*, Robertson, Closing the *Massachusetts Mutual v. Russell* Gap: Monetary Damage Awards under ERISA § 502(a)(3), 48 *Washington & Lee L. Rev.* 691, 720 (1991); *Oscar A. Samos, M.D. Inc. v. Dean Witter Reynolds Inc.*, 772 F. Supp. 715 (D.R.I. 1991); *Reid v. Gruntal & Co., Inc.*, 763 F. Supp. 672 (D. Me. 1991). In the *Samos* case, one plaintiff, a beneficiary of the employee benefit plan, claimed that he could obtain direct compensatory damages from a fiduciary who allegedly improperly distributed plan proceeds to the beneficiary's wife. The beneficiary claimed that the damages he sought were akin to the damages sought in *Warren*, and not to the emotional distress and punitive damages which had earlier been found by the First Circuit not to be recoverable under § 502(a)(3). The *Samos* court also found that the distinction between contractual

and extra-contractual damages found by the court in *Warren* was not the proper analysis, and that the First Circuit's decision in *Drinkwater v. Metropolitan Life Insurance Company*, 846 F.2d 821, 824-25 (1st Cir.) *cert. denied* 488 U.S. 909 (1988), precluded damages which flowed directly from an alleged breach, as well as emotional distress and punitive damages.

In sum, all courts and commentators other than two of the judges on the *Warren* panel have had no difficulty in determining that monetary damages of all kinds are not allowed under Section 502(a)(3) of ERISA. Before the Sixth Circuit decided the *Warren* case, the First, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits had found that monetary damages were not allowed under § 502(a)(3) of ERISA. *See Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Sommers Drug Store Company v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied* 479 U.S. 1034 (1987); *Powell v. Chesapeake & Potomac Telephone Company*, 780 F.2d 419 (4th Cir. 1985), *cert. denied* 476 U.S. 1170 (1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Kleinhans v. Lisle Saving Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Drinkwater*. In *Warren*, the Sixth Circuit did not overrule *Varhola*. Even in the Sixth Circuit, then, monetary damages have been upheld only in a very narrow factual situation.

Since the decision in the *Warren* case, the Eleventh Circuit has determined that monetary damages are not available under § 502(a)(3) of ERISA, the Seventh Circuit has confirmed that its earlier decision is still valid after the *Warren* decision, and the Eighth Circuit has, in the case presently before the Court, determined that monetary damages are not available under Section 502(a)(3) of

ERISA. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991); *Harsch*; *Novak*. It is clear that the result in *Warren* is anomalous, and will be limited in the future to the Sixth Circuit and the narrow factual situation in which it arose.

II. SHOULD CERTIORARI BE GRANTED, THIS CASE COULD BE RESOLVED ON GROUNDS SEPARATE FROM THE ALLEGED CONFLICT BETWEEN THE CIRCUITS.

Both before the trial court and the Court of Appeals, respondents relied upon two bases for the dismissal of Novak's claim. The first basis was that monetary damages were not "other appropriate equitable relief" under Section 502(a)(3) of ERISA. It was on this basis that the trial court dismissed Novak's claim and the Eighth Circuit affirmed that dismissal. The second basis was that no violation of the Plan had occurred, so that no remedy was necessary. Neither the District Court nor the Court of Appeals reached the second basis. This Court may affirm the Eighth Circuit, however, on any basis, not simply the basis relied upon by the Eighth Circuit. If certiorari is granted in this case, respondents will properly argue that the Eighth Circuit's decision should be affirmed, not only because it is the correct interpretation of ERISA, but also because the Plan does not require distribution of the notice Novak did not receive.

Contrary to petitioner's interpretation of the Plan, no provision of the Plan expressly requires that a written rollover notice be given to a participant. Petitioner's contention that the Plan requires such notice is based solely

on petitioner's own interpretation, as opposed to that of the Committee, of the language of Section 3.9 of the Plan. Section 3.9 of the Plan states:

> *Reports, Etc.* The committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file and distribute the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the committee.

Respondents maintain that the IRS notice is not a report, disclosure or filing within the meaning of the Plan.

The method of interpreting ERISA plans is determined by the plan documents themselves. If the terms of the plan give the plan administrators the authority to interpret plan provisions, then the administrators' interpretation may be set aside only if it is arbitrary and capricious or an abuse of discretion. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The Supreme Court noted in *Firestone* that trust law principles apply in determining the standard of review a court should apply to actions of ERISA plan fiduciaries. The governing tenet of trust law applied by the Court was "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Firestone*, 489 U.S. at 111. The Court held that whether discretion has been conferred upon a plan fiduciary depends upon the language of the plan, but if

such discretion has been conferred, actions of the fiduciary will be reviewed on an arbitrary and capricious or abuse of discretion standard. *Firestone*, 489 U.S. at 111.

The Plan gives the Committee the authority to interpret the Plan. Section 3.4 states:

> *Committee Powers.* The committee shall have the power to make reasonable rules and regulations required in the administration of the plan, to make all determinations which the plan requires for its administration, except those determinations which the plan requires others to make, and *to construe and interpret the plan* whenever necessary to carry out its intent and purpose and to facilitate its administration. Except to the extent inconsistent with law, all such rules, regulations, determinations, constructions and interpretations so made by the committee shall be binding upon all interested parties.

Section 3.4 [emphasis added]. Thus, the administrators in the instant case plainly have discretion to interpret the Plan which can only be disturbed if that discretion is abused.

The administrators of the Plan, pursuant to their authority under Section 3.4 of the Plan, have interpreted Section 3.9 to require only the distribution of reports and notices required by ERISA, not literally *any* report or notice required by *any* law. There are numerous reports required by many laws other than ERISA which affect employees, such as Title VII, OSHA, and the Internal Revenue Code. There are also numerous reports and disclosures required by many laws which do not affect employees. Petitioner urged the lower courts and would

urge this Court to determine that *all* reports required to be distributed by *any* law are incorporated into the Plan by Section 3.9, and that failure to distribute any report can lead to a recovery of monetary damages from the Plan. Clearly, Section 3.9 refers to something less than all laws. The Committee is given the authority to determine what subset of all laws is encompassed by Section 3.9 of the Plan. The Committee reasonably determined that requirements of other statutes and other bodies of law were not meant to be incorporated into the Plan by Section 3.9. It certainly was not an abuse of discretion for the Committee to determine that the ERISA-required reports regarding plan administration and performance were all that were intended to be encompassed by Section 3.9 of the Plan.

The written notice which petitioner did not receive is required by Internal Revenue Code § 402(f). When Congress added this provision to the law it did so in the Internal Revenue Code, seeing this as a tax notice, not an employee benefit notice. Congress had the opportunity to place this notice requirement in ERISA and did not do so. Moreover, ERISA § 502(c) provides penalties for the failure to distribute certain reports required by the Internal Revenue Code. Significantly, the written notice required by § 402(f) of the Internal Revenue Code is not one of the reports for which a penalty is provided. Congress, therefore, when requiring the § 402(f) notice, did not consider the notice sufficiently linked to ERISA to provide a penalty under ERISA for the failure to distribute the notice. The only remedy which Congress provided for the failure to distribute this notice was a $10 fine. It is not an abuse

of discretion for the committee to treat this notice as Congress did, as an IRS notice, not an ERISA notice.

Petitioner did not contend, nor could petitioner contend, that ERISA required the report. Petitioner claimed only that the Plan required distribution of the report. The Plan, however, gives the administrators of the Plan discretion to interpret the Plan. Pursuant to that discretion the administrators of the Plan interpreted the Plan to require the distribution of ERISA required reports and notices and not IRS required reports and notices which are not mentioned in § 502(c) of ERISA. This is a reasonable interpretation of the Plan which was clearly not an abuse of discretion by the administrators of the Plan. Thus, if this Court were to accept certiorari in this case, it may not address the issue presented by petitioner, because the decision of the Eighth Circuit is sustainable on grounds independent of the ground upon which the alleged conflict exists.

CONCLUSION

For these reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: September 23, 1992

Respectfully submitted,

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No. 92-352

In the Supreme Court of the United States

OCTOBER TERM, 1992

JASON W. NOVAK, PETITIONER

v.

ANDERSEN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), can include an award of monetary relief to compensate a participant in an ERISA plan for tax losses caused by the plan administrators' violation of the terms of the plan.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Petitioner was an employee of respondent Andersen Corporation.[1] After he voluntarily terminated his employment, he elected to receive a cash distribution of all benefits he had accumulated in respondent Andersen Corporation Employee Stock Ownership Plan, a plan covered by the Employee Retirement Income Security

[1] The lower courts decided this case on respondents' motion for summary judgment and therefore the evidence and inferences should be viewed in a light most favorable to petitioner. See Pet. App. A14.

Act of 1974 (ERISA). The plan distributed funds to him on two occasions: he received $84,637 on June 29, 1987, and $3,199.54 on February 2, 1988. The plan did not notify petitioner that the funds had to be transferred to an eligible retirement plan within 60 days in order to qualify for federal income tax deferral under 26 U.S.C. 402(a)(5). Under 26 U.S.C. 402(f), the administrators of the plan were required to give petitioner that notice (generally referred to as a rollover notice). Petitioner did not transfer any portion of the funds into an eligible retirement plan within 60 days, and he accordingly became obligated to pay federal income tax on the entire amount of the distributions. Pet. App. A3-A4, A12-A13.

2. Petitioner subsequently filed suit against respondents in the United States District Court for the District of Minnesota. He contended that respondents' failure to send the rollover notice violated Section 3.9 of the plan, which provided that the plan's administrators "shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall * * * distribute the same as so required." See Pet. App. A3-A4. Petitioner sought compensation for the tax losses he incurred because of his failure to transfer the benefits in accordance with 26 U.S.C. 402(a)(5). Petitioner contended that the relief he sought was available under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), as "appropriate equitable relief * * * to redress" the violation of the plan.

The district court granted summary judgment in favor of respondents. Pet. App. A11-A21. The court stated that five courts of appeals have concluded that compensatory relief is not "appropriate equitable relief" available under Section 502(a)(3) of ERISA,[2] and that only the

[2] The court cited *Drinkwater* v. *Metropolitan Life Insurance Company*, 846 F.2d 821 (1st Cir.), cert. denied, 488 U.S. 909 (1988);

Sixth Circuit, in *Warren* v. *Society National Bank*, 905 F.2d 975 (1990), cert. denied, 111 S. Ct. 2256 (1991), had reached the opposite conclusion. Pet. App. A19-A20. Without any independent reasoning, the court followed "the greater weight of authority" and "decline[d] to follow the Sixth Circuit." *Id.* at A20. Hence, the district court granted summary judgment for respondents. *Ibid.*[3]

3. A divided panel of the court of appeals affirmed. Pet. App. A1-A10.

a. Because the court assumed, "without deciding," Pet. App. A4, that the failure to send the rollover notice violated the plan, the only issue before the court was whether the relief sought by petitioner was available under Section 502(a)(3). On that question, the court concluded that the reference to "other appropriate equitable relief" in Section 502(a)(3) refers only to "declaratory or injunctive relief." Pet. App. A6-A7. The court noted that a Senate Report considering a predecessor to ERISA had listed injunctions, declaratory relief, and imposition of a constructive trust as examples of relief that would have been available under the proposed statute, and suggested that the absence of a reference in the legislative history to compensatory relief supported its interpretation of the statute as enacted. *Id.* at A7.

Powell v. *Chesapeake and Potomac Telephone Company*, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Kleinhans* v. *Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); and *Sokol* v. *Bernstein*, 803 F.2d 532 (9th Cir. 1986).

[3] Because the district court granted summary judgment on the compensatory relief issue, it had no occasion to consider the validity of respondents' contention that they had not violated the plan in any event, because Section 3.9 of the plan did not require distribution of the rollover notice. Pet. App. A16-A18.

The court of appeals also relied on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), which held that similar relief was not available under Section 502(a)(2) of ERISA. Although the court acknowledged that *Russell* interpreted a different provision of ERISA, it nevertheless "f[ou]nd its analysis persuasive under § 502(a)(3)(B)." Pet. App. A8.

The court also "decline[d] to adopt the reasoning of the Sixth Circuit" in *Warren*. Pet. App. A8. The court explained that "[d]amages are damages, and an award of damages is a legal, not an equitable, remedy." *Id.* at A9. The court further stated that it would not have awarded relief in this case even if it were willing to follow the Sixth Circuit and award damages in some situations. In its view, *Warren* was a case in which the beneficiary was denied his right to "an actual benefit he was entitled to under the plan"—in that case, a single-sum distribution. In this case, the court reasoned, petitioner received all the benefits to which he was entitled under the plan. Pet. App. A9.

b. Judge Stuart dissented. Pet. App. A9-A10. He relied principally on the portion of Section 502(a)(3) that states that "appropriate equitable relief" should be granted to "redress" violations of the plan. Because the word "redress" means "compensate," he agreed with the Sixth Circuit that the provision should be construed to include compensatory relief. Pet. App. A10.

4. The court of appeals originally entered judgment on April 9, 1992. See Pet. App. A2. Petitioner subsequently filed a document styled "Petition for Rehearing En Banc," which the court of appeals denied on May 29, 1992. Pet. App. A22. Because the document constituted a

petition for rehearing under the Eighth Circuit's rules,[4] the petition for a writ of certiorari filed on August 26, 1992, was timely.[5]

DISCUSSION

On the merits, we agree with petitioner that the court of appeals erred in holding that the "appropriate equitable relief" available under Section 502(a)(3) of ERISA can never include compensatory damages. We also agree with petitioner that the courts of appeals have reached conflicting results on that question. Nevertheless, because the Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671 (argued Feb. 22, 1993), might clarify

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[4] See 8th Cir. R. 35A(c)(4) ("All suggestions for rehearing en banc, no matter how styled, shall be deemed to include both a petition for rehearing by the panel that decided the case and a suggestion for rehearing en banc."), 40A(b)(2) ("Every petition for rehearing en banc * * * shall automatically be deemed to include a petition for rehearing by the panel."). It is clear that the court of appeals followed this rule, because the May 29, 1992, order rejecting the petition explicitly refers to the document as including a petition for rehearing. See Pet. App. A22 ("The petition for rehearing is * * * denied.").

[5] Respondents suggest (Br. in Opp. 3 n.2) that the petition for a writ of certiorari was not filed in a timely manner, because the petition for a writ of certiorari was filed more than 90 days after the original judgment. But the document petitioner filed constituted a petition for rehearing for purposes of this Court's Rule 13.4, which thus extended the time for filing the petition for a writ of certiorari. Under *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), the courts of appeals have considerable discretion to determine whether to treat a particular document as a petition for rehearing, and the treatment they give the document at the time they receive it generally will be accepted as dispositive of the question by this Court. See *id.* at 47-49 (concluding on the facts of that case that a document styled "Petition for Rehearing En Banc" constituted a petition for rehearing). This Court should treat the petition for a writ of certiorari as timely in light of the court of appeals' characterization of the document in question.

the governing legal principles, we do not believe it is necessary for the Court to grant plenary review at this time.

1. The issue in this case is whether a court's authority to award "appropriate equitable relief * * * to redress" a violation of the terms of an ERISA plan includes authority to award compensatory relief. As we argued in our brief on the merits in *Mertens*, it does. See Gov't Br. at 10-20, *Mertens* [hereinafter *Mertens* Br.].[6] As we explained there, courts should refer to the general principles courts of equity applied in trust cases to determine what types of "equitable relief" are "appropriate" to "redress" violations of ERISA plans. See *id.* at 10-11. Under those principles, make-whole monetary relief was a traditional equitable remedy. See *id.* at 12-14. Although the factual basis for the claim in this case differs from that asserted in *Mertens*, the same legal principle governs: Congress authorized federal courts to provide beneficiaries compensatory relief available under common-law equitable principles.[7]

Common-law equitable principles establish here—as they do in *Mertens*—that make-whole relief was available in a case like this one, an action by a beneficiary seeking compensation for damages incurred because of a fiduciary's failure to comply with the terms of the trust instrument. Section 199(c) of the Restatement of Trusts provides that one of the "equitable remedies of [a] beneficiary" is a suit "to compel the trustee to redress a breach of trust." 1 Restatement (Second) of Trusts 437

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[6] We have provided counsel for the parties with copies of our brief on the merits in *Mertens*.

[7] In *Mertens*, plan beneficiaries seek damages, on behalf of a plan, to compensate the plan for losses incurred as a result of a nonfiduciary's knowing participation with a fiduciary in a breach of fiduciary duty.

(1959) [hereinafter Restatement]. Moreover, comment a to Section 205 (the provision setting forth the nature of remedies available in a suit described in Section 199 of the Restatement), explains that the remedy is designed to "put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." 1 Restatement, *supra*, at 458. Finally, it is clear that the remedy includes not only a right to wrongfully withheld benefits, but a right to consequential damages like the damages sought in this case. See George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 701, at 198 (2d ed. rev. 1982) ("Both direct and consequential damages may be awarded."); see also Restatement (Third) of Trusts § 205 app. comment a, at 223 (1990) ("If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach."). Accordingly, because a court of equity would have awarded petitioner the relief sought in this case, that relief should be "appropriate equitable relief" for purposes of Section 502(a)(3) of ERISA.

Moreover, because ERISA would preempt a state-law action that allowed a damages recovery based on a violation of an ERISA plan, the court of appeals' interpretation of Section 502(a)(3) in this case would contradict the policy of ERISA by leaving beneficiaries with less effective remedies than those available to them before ERISA was enacted. See *Mertens* Br. 16-18; compare *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans.") (internal quotation marks omitted). Finally, our reading of Section 502(a)(3) is

confirmed by the civil penalty provision in Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. III 1991), which provides for a civil penalty based on the "amount * * * to be paid * * * participants and beneficiaries" in a civil action, and therefore rests on the premise that Section 502(a)(5)—a counterpart to Section 502(a)(3) with the same operative language—allows compensatory monetary relief. See *Mertens* Br. 18-20.[8] For those reasons, we disagree with the conclusion of the court of appeals that Section 502(a)(3) does not authorize an award of compensatory monetary relief.

2. The decision of the court of appeals conflicts with the decision of the Sixth Circuit in *Warren* v. *Society National Bank*, 905 F.2d 975 (1990), cert. denied, 111 S. Ct. 2256 (1991). In *Warren*, the beneficiary suffered adverse tax consequences in connection with his withdrawal from an ERISA plan because the trustee (in violation of the terms of the plan) failed to distribute all of the funds due to the beneficiary within a single calendar year. See 905 F.2d at 976. Dr. Warren sought damages as compensation for the resulting tax losses. The *Warren* court concluded that such damages were available under Section 502(a)(3) of ERISA, reasoning that it should interpret the provision in light of the law

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[8] Respondents suggest (Br. in Opp. 5) that Congress's reference to both "equitable" and "legal" relief in Section 502(g)(2) of ERISA, 29 U.S.C. 1132(g)(2), undermines our view that Section 502(a)(3)'s reference to "equitable" relief encompasses the broad range of remedies available in trust cases in courts of equity. Respondents fail to note, however, that Section 502(g)(2) provides remedies not only for failure to comply with a trust instrument, but also for failure to comply with a collective bargaining agreement. Because the collective bargaining agreement is not itself a trust document, Congress reasonably might have thought that ordinary contractual remedies for a breach of that document would be characterized as "legal," rather than "equitable," relief.

of trusts, and that under trust law "a beneficiary is entitled to a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 905 F.2d at 981 (quoting *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 157 n.16 (1985) (Brennan, J., concurring) (internal quotation marks omitted)). Because the damages sought by Dr. Warren were designed to put him in the position in which he would have been if the trustee had complied with the terms of the trust, the court concluded that the damages were "appropriate equitable relief" available under Section 502(a)(3) of ERISA. 905 F.2d at 981-982.

The analysis of the court of appeals in this case is contrary to the analysis of the Sixth Circuit in *Warren*. The court here concluded that the relief sought by petitioner was unavailable because Section 502(a)(3) allows only "declaratory or injunctive relief," Pet. App. A7, and rejected petitioner's reliance on *Warren* with the explanation that "[d]amages are damages, and an award of damages is a legal, not an equitable, remedy," Pet. App. A9; see *id.* at A8 ("[W]e decline to adopt the reasoning of the Sixth Circuit on this issue."). It seems clear that petitioner would have prevailed under the reasoning the Sixth Circuit applied in *Warren*,[9] and just

[9] We do not understand the suggestion of the court of appeals that its reasoning could be reconciled with *Warren* on the theory that Dr. Warren differed from petitioner in that Dr. Warren "was denied an actual benefit he was entitled to under the plan," Pet. App. A9. If the court used the term "actual benefit" to refer to the payment of the total monetary benefits due under the plan, then both petitioner and Dr. Warren received all the "actual benefit" due under the plan. See 905 F.2d at 976 (describing disbursement to Dr. Warren of benefits owed to him). On the other hand, if the court used the term to suggest that Dr. Warren was denied some nonmonetary benefit to which he was actually entitled under the plan (such as the right to have a lump-sum

as clear that Dr. Warren would not have prevailed under the reasoning applied by the court of appeals in this case.[10]

Respondents suggest (Br. in Opp. 8-12) that the decision of the Sixth Circuit in *Warren* is an anomaly because the overwhelming majority of the courts of appeals agree with the decision in this case. Although we agree that two of the other courts of appeals have held that compensatory damages are not available under Section 502(a)(3), see *Harsch* v. *Eisenberg*, 956 F.2d 651, 656-660 (7th Cir.), cert. denied, 113 S. Ct. 61 (1992); *Drinkwater* v. *Metropolitan Life Insurance Company*, 846 F.2d 821, 824-825 (1st Cir.), cert. denied, 488 U.S. 909 (1988), we do not believe the split is as one-sided as respondents suggest. Unlike this case and *Warren*, all of the other decisions on which respondents rely involve claims for punitive damages or emotional distress that would not ordinarily have been available in a common-law contract action.[11] Because the remedies available in

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distribution), then Dr. Warren was in no different posture than petitioner, who has alleged that respondents denied him his right under the plan to receive certain notices in connection with his distribution.

[10] In response to the Court's request that the Solicitor General express the views of the United States, the government filed a brief arguing that the decision in *Warren* was correct, and that it was not necessary for the Court to grant the petition in that case because of the lack of a well-developed conflict on the question at that time. See Gov't Br., *Warren*, No. 90-870 (O.T. 1990).

[11] See *McRae* v. *Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991) (damages for emotional distress, embarrassment, humiliation, and damage to financial reputation); *Varhola* v. *Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages); *Kleinhans* v. *Lisle Sav. Profit Sharing Trust*, 810 F.2d 618, 626-627 (7th Cir. 1987) (punitive damages); *Sokol* v. *Bernstein*, 803 F.2d 532, 534-539 (9th Cir. 1986) (emotional distress); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793

equity for a breach of trust closely followed the remedies that would have been available for a breach of contract in a court of law,[12] those cases are not directly analogous to this one.

3. Given the obvious importance of the question presented by the petition—which involves a basic issue about the scope of one of the cornerstones of ERISA's remedial framework—and the existence of a conflict in the circuits, we believe that the question presented in the petition ordinarily would merit plenary review by this Court. Because of the pendency of *Mertens*, however, we do not believe review is necessary at this time.[13]

F.2d 1456, 1462-1465 (5th Cir. 1986) (punitive damages), cert. denied, 479 U.S. 1034 (1987); *Powell* v. *Chesapeake and Potomac Telephone Company*, 780 F.2d 419, 424 (4th Cir. 1985) (punitive damages and damages for emotional distress), cert. denied, 476 U.S. 1170 (1986).

[12] See, *e.g.*, 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 n.15 (Spencer W. Symons 5th ed. 1941) (explaining that the equitable liability for breach of trust is "of the same nature as that arising from breach of contract"); *Mertens* Br. 13-14 & n.17.

[13] Respondents also identify another potential problem with the case by noting (Br. in Opp. 12-16) that the lower courts have not yet determined whether the facts alleged by petitioner would constitute a breach of the plan; instead, those courts proceeded on the assumption that petitioner had alleged a violation and disposed of the case on that basis. See Pet. App. A4 (court of appeals "assume[d] without deciding that this failure to give notice was a breach of the Plan"), A18 (district court determined that it did not "need [to] reach these issues because [respondents] are entitled to summary judgment on [the Section 502(a)(3) ground presented in the petition]"). Because that claim apparently was preserved in the court of appeals and in the brief in opposition, it would be properly before the Court if the Court were to grant review in this case. Accordingly, even if the Court granted review in this case, it

It is quite possible that the view this Court takes of the analysis of the court of appeals will be affected by this Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671. As we stated above, we have argued in that case that Section 502(a)(3) authorizes federal courts to award compensatory relief to redress violations of ERISA and ERISA plans. If the Court accepts that submission and reverses the judgment of the Ninth Circuit in that case, the opinion may cast considerable doubt on the validity of the court of appeals' analysis in this case. Accordingly, the Court at that time might wish to grant the petition in this case, vacate the judgment of the court of appeals, and remand for further consideration in light of *Mertens*. Similarly, if the Court were to reject our submission in *Mertens* and affirm the judgment of the Ninth Circuit in that case, the opinion—depending on its rationale—could cast considerable doubt on the validity of the analysis of the Sixth Circuit in *Warren*. In that event, the Court might wish to deny the petition in this case and await further developments.

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could affirm the judgment of the court of appeals without considering the important question presented by the petition.

Of course, the Court would have discretion if it granted the petition to decline to consider whether the facts alleged by petitioner are sufficient to constitute a violation of the plan. In our view, such a course would be entirely appropriate. Neither of the lower courts have addressed the question, compare *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and the district court's opinion suggested considerable reluctance to dispose of the question without allowing further discovery by petitioner. Respondents have not suggested any reason why the Court would wish to depart from its usual practice and consider that question without the benefit of prior consideration by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's disposition of *Mertens* v. *Hewitt Associates*, No. 91-1671.

Respectfully submitted.

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